THE MEDIA AND ENTERTAINMENT LAW REVIEW

THIRD EDITION

Editor
Benjamin E Marks

THE LAWREVIEWS

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PREFACE

I am pleased to serve as editor and US chapter author of this important survey work on the evolving state of the law around the world as affects the day-to-day operations of the media and entertainment industries.

The year 2021, like 2020, has been an unusual and challenging one, as the media and entertainment industries continue to adapt to the ravaging effects of the covid-19 pandemic. While there has been some degree of recovery in many countries, with lockdowns abating and the return of live music, festivals, theatrical performances and live sporting events, attendance at in-person events remains well below the norm. Concert promoters, touring artists and theatre and venue operators remain hard hit by the ongoing effects of the pandemic, but other parts of the media and entertainment industries have fared quite well. Bolstered by the continued growth of on-demand music streaming services, music publishers and record companies are flourishing. The market for on-demand video streaming continues to evolve, with numerous high-profile product launches over the past year, and disruptions to the previously prevailing practice of an exclusive period of theatrical release preceding streaming for high-profile movies. It remains to be seen which changes to the media and entertainment industries in response to the pandemic will prove temporary and which will be permanent.

The pandemic is hardly the only global phenomenon accelerating changes to media and entertainment. We continue to see a rise in challenges to press freedom by repressive government regimes – a phenomenon, it should be noted, that has been testing the strength of free speech traditions in the world's most protective speech regime, the United States. The manifestations include increased censorship, reduced transparency and more appalling acts of violence against journalists and editors. Around the world, business, governments and legal regimes continue to adapt to technological change, with the increased use of artificial intelligence and 'deep fakes' just a few of the examples at the forefront.

This timely survey work provides important insights into the ongoing effects of the digital revolution and evolving (and sometimes contrasting) responses to challenges both in applying existing intellectual property laws to digital distribution and in developing appropriate legislative and regulatory responses that meet current e-commerce and consumer protection needs. It should be understood to serve not as an encyclopedic resource covering the broad and often complex legal landscape affecting the media and entertainment industries, but, rather, as a current snapshot of developments and country trends likely to be of greatest interest to the practitioner. Each of the contributors is a subject field expert and their efforts here are gratefully acknowledged. Each has used his or her best judgement as to the topics to highlight, recognising that space constraints required some selectivity. As will

be plain to the reader, aspects of this legal terrain, particularly those relating to the legal and regulatory treatment of digital commerce, remain in flux, with many open issues that call for future clarification.

This work is designed to serve as a brief topical overview, not as the definitive or last word on the subject. You or your legal counsel properly should continue to serve that function.

Benjamin E Marks
Weil, Gotshal & Manges LLP
New York
November 2021

Chapter 1

AUSTRALIA

Sophie Dawson, Julie Cheeseman, Joel Parsons and Emma Croft[1]

I OVERVIEW

The year 2021 has, like 2020 before it, been marked by covid-19 and by the continuation of the largest suite of law reform processes in Australian media law history, as regulators grapple with the implications of globalisation and the convergence of the media and entertainment industries.

Australia has led the way in proactively legislating to address new challenges that have arisen as a result of a relatively small number of digital platforms and app marketplaces having a very important role as gateways to media content.

Early in the year, the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021 was passed, the effect of which was to require certain major digital platforms to pay registered news business for the making available of registered news business covered news content. Where the amount of these payments cannot be agreed, a final offer arbitration process is available to resolve them. Shortly after the legislation was passed, deals were reached between each of Facebook, Google and major media organisations. This did not require utilisation of the processes provided for in the Act and was achieved by way of negotiation.

In addition, the government continued its consultation in relation to its media reform Green Paper launched on 21 December 2010, which proposed reforms to even the playing field between commercial broadcasters and video-on-demand services. The measures under consideration include encouraging commercial television broadcasters to reduce spectrum use in exchange for a reduced regulatory burden, and introducing an investment obligation for subscription and advertising video-on-demand services. The proposed measures follow a very substantial shift of Australian viewers from traditional broadcasters to video-on-demand services, particularly among younger demographics.

The first tranche of defamation law reforms commenced this year. On 1 July 2021, amendments to those defamation laws came into effect in New South Wales (NSW), Victoria, South Australia and Queensland (QLD). These are the first Australian states to enact the nationally agreed Model Defamation Amendment Provisions 2020. The remaining Australian states and territories have committed to implementing the new regime as soon as possible after 1 July 2021.

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1 Sophie Dawson and Julie Cheeseman are partners and Joel Parsons and Emma Croft are associates at Bird & Bird. The authors gratefully acknowledge the contributions of Jarrad Parker, Katrina Dang and Natasha Godwin to earlier versions of this chapter (parts of which remain) and the support of their colleagues in the Bird & Bird media team in relation to this publication, in particular, James Hoy and Isabella Boag-Taylor.

The second tranche of defamation law reforms, relating to online defamation and to qualified privilege, has continued throughout 2021. Consultation on the reforms has attracted particular focus following the High Court decision in the case of *Fairfax Media Publications Pty Ltd; Australian News Channel Pty Ltd v. Voller* (*Voller*)[2] to the effect that the owners of public Facebook pages facilitated, encouraged and thereby assisted the posting of comments by third-party Facebook users and that this rendered the public page owners publishers of those comments for defamation purposes.

Groundbreaking law reforms continued to be the subject of debate and consideration. The most significant of these flowed from the Australian Competition and Consumer Commission (ACCC) Digital Platforms Inquiry, which resulted in the Digital Platforms Inquiry – Final Report, published on 26 July 2019 (the ACCC Report). The ACCC Report recommended significant changes to Australia's privacy laws and an inquiry in relation to the supply of advertising technology services and advertising agencies, codes of conduct to deal with disinformation and to govern the relationship between digital platforms and media organisations, and a variety of competition law, copyright, anti-disinformation, tax and educational measures.

There are also concurrent processes under way in relation to classification,[3] open justice,[4] advertising technology (adtech)[5] and privacy.[6]

II LEGAL AND REGULATORY FRAMEWORK

i Defamation laws

Australia's defamation laws, like those of the United Kingdom and the United States, are largely based on common law principles originally developed in England.

Until recently, they did not include the serious harm requirement introduced in the United Kingdom in 2013[7] and they do not contain the US public figure defence.[8]

In 2005, largely uniform defamation legislation was enacted in each Australian state and territory (the Uniform Defamation Acts) to harmonise Australian defamation laws. This legislation modifies certain common law principles relating to the question of whether and in what circumstances a cause of action arises, and in relation to damages. It also contains statutory defamation defences that apply in addition to common law defamation defences.

In Australia, it is necessary for a defamation plaintiff to establish:

a publication (which may occur by any means of communication);

2 *Fairfax Media Publications Pty Ltd; Nationwide News Pty Limited; Australian News Channel Pty Ltd v. Voller* [2021] HCA 27.

3 See https://www.communications.gov.au/have-your-say/review-australian-classification-regulation.

4 https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Courtinformation/Project_update.aspx.

5 https://www.accc.gov.au/media-release/ad-tech-and-ad-agency-services-inquiry-kicks-off.

6 https://treasury.gov.au/publication/p2019-41708.

7 Defamation Act 2013 (UK) Section 1(1); see also *Lachaux v. Independent Print Limited & Ors* [2015] EWHC 2242.

8 The public figure defence was established in *New York Times Co v. Sullivan* 376 US 254 (1964) and is a development of the common law qualified privilege defence. In Australia, there is a category of common law qualified privilege in relation to government and political matters that protects publications that are reasonable in the circumstances. The latter category flows from the implied constitutional freedom of speech in relation to government and political matters discussed in Section III.i.

b a defamatory meaning (a meaning that would be likely to cause the ordinary reasonable reader to think less of the plaintiff or to shun and avoid him or her); and

c identification (that some or all readers would understand the relevant communication as relating to the plaintiff).

The Uniform Defamation Acts provide that for-profit companies with 10 or more employees do not have a cause of action for defamation.[9] It also changes the choice of law principle applicable to publication to persons within Australia, such that the applicable law is the law with the closest connection with the harm occasioned by the publication, which is determined by reference to a number of factors.[10]

Once a cause of action is established, a defendant will be liable unless it, he or she can establish a defence. The statutory defences are in addition to their common law counterparts. Key defences include:

a common law and statutory qualified privilege defences;

b fair protected report defences (which protect fair reports of court, tribunal and parliamentary proceedings);

c justification (truth) defences;

d a contextual truth defence;

e an honest opinion defence (which requires that the material for comment is included in or adequately referred to in the matter complained of);

f innocent dissemination (of particular relevance to internet content hosts, newsagents and other distributors); and

g a triviality defence.

In addition, Clause 91 of Schedule 5 of the Broadcasting Services Act 1992 (Cth) provides immunity from state and territory laws and common law and equitable principles to internet service providers and internet content hosts where they are not aware of the nature of the content in question. Clause 91 has not been considered by the courts and the extent of the protection that it gives these entities is uncertain. As noted below, it will be replaced on 23 January 2022 by a similar provision in the Online Safety Act 2021 (Cth).

There has been controversy in the past year in relation to certain decisions concerning liability for online publications.

The High Court in *Trkulja v. Google LLC*[11] rejected findings by the Court of Appeal, which, in effect, applied special tests and considerations to determine whether search engine results were capable of defaming a plaintiff. The *Trkulja* case also confirms that search engines bear the onus of establishing 'that the degree of its participation in the publication of the impugned search results was such that it should not be held liable'.[12]

In the *Voller* case, media organisations were found by the High Court to be primary publishers of third-party comments made on their public Facebook pages.[13] The Court did

9 See, for example, Section 9 of the Defamation Act 2005 (NSW).

10 See Section 11 of the Defamation Act 2005 (NSW). At common law, a cause of action arises each time defamatory material is read or received, and the law applicable to each cause of action is that of the place in which the recipient of the communication is situated: *Dow Jones & Co Inc v. Gutnick* (2002) 210 CLR 575.

11 (2018) 92 ALJR 619; [2018] HCA 25.

12 [2018] HCA 25 at [41].

13 See footnote 2.

not determine whether the innocent dissemination defence was available to the organisations, with the consequence that it is not clear whether liability will arise from the time that the comments were first read or from the date on which the media organisations became aware of them.

Australian state and territory attorneys general announced on 27 July 2020 that the substance of defamation law amendments had been agreed. Amendments have now been passed in NSW, Victoria, South Australia and QLD.

Key changes made by the amending legislation include:

a the introduction of a serious harm test, which is modelled on the UK test but with substantial differences in drafting (e.g., the Australian serious harm test operates independently of the test for whether material is defamatory);

b a single publication rule applicable for limitation period purposes, the effect of which will be to prevent the one-year limitation period from refreshing in certain circumstances where there are multiple publications of substantially the same matter in substantially the same manner;

c a new defence for certain peer reviewed publications;

d a new public interest defence;

e amendments to make the contextual truth defence effective; and

f changes to clarify the operation of the damages cap and to revert to the common law position in relation to the award of aggravated damages.

The second tranche of defamation law reform, aimed at online law reform and qualified privilege defences, is also under way. Initial submissions have been received and consultation is taking place. Changes being considered include:

a regulatory categorisation of internet intermediary functions or the purposes of defamation law (including potentially by reference to the terms 'basic internet services, digital platforms and forum hosts';

b introduction of new, or modification of existing, immunities and defences for internet intermediaries, including the potential amendment of innocent dissemination (to more effectively appropriately accommodate the operation of internet intermediaries), introduction of a safe harbour for internet intermediaries subject to a complaints process (similar to Section 5 of the UK Defamation Act 2013) or a wide-ranging immunity akin to Section 230 of the US Communications Decency Act 1996;

c introduction of statutory provisions providing for the courts' ability to order that online material be removed; and

d introduction of statutory mechanisms providing for courts to order the identification of content originators by internet intermediaries (complementary to pre-existing court processes that allow for pre-action discovery).

The second tranche of reform being considered is the extension of absolute privilege in the context of statements made to police and statutory investigative agencies and complaints of unlawful conduct made to employers and professional disciplinary bodies.

ii Privacy laws

Privacy in Australia is regulated by a complex web of commonwealth, state and territory legislation, as well as equitable (confidentiality) and potentially also common law principles.

The principal privacy law in Australia is the Privacy Act 1988 (Cth). This Act contains 13 Australian Privacy Principles that are the primary rules relating to collection, use and disclosure of, and access to, data held by private sector organisations, including media organisations.

Importantly, there is an exemption in the Privacy Act in relation to acts in the course of journalism by media organisations that have publicly committed to standards dealing with privacy in a media context. Most media organisations have made relevant public commitments (e.g., to the Press Council Privacy Principles,[14] or, in the case of broadcasters, the relevant code of practice).[15] This is important, as the Australian Privacy Principles would otherwise prevent media organisations from collecting sensitive information without consent, except in very limited circumstances.[16]

The ACCC Report focuses on advertising technology and other privacy practices of digital platforms. It concludes that certain changes should be made to Australian privacy laws and raises the question of whether they should be more broadly reviewed. The Attorney-General's department released an issues paper in respect of potential privacy reform arising out of the ACCC Report and will shortly release a further discussion paper and draft bill for further submissions.

The ACCC also released its Digital Advertising Services Inquiry – Final Report (the AdTech Report). The AdTech Report identified concerns about the extent of Google's market power in the adtech industry, finding that over 90 per cent of ad impressions traded via the adtech supply chain pass through at least one Google service. It recommended greater transparency on the part of Google and that the ACCC be given the power to introduce sector-specific rules (including in relation to transparency) to address competition issues. It also found that industry standards should be developed to require adtech providers to publish average fees and 'take rates' for adtech services, and to enable verification of demand-side platform services.

There is mixed case law in Australia on the question of whether there is a cause of action for invasion of privacy either in the form of a tort or as a species of breach of confidence. In *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd*,[17] the High Court left open the question of whether such a cause of action is available. Since then, lower courts have, in different cases, made conflicting decisions about whether such a cause of action exists and on what basis. In *Doe v. Fairfax Media Publications Pty Ltd*,[18] Fullerton J considered whether there was a cause of action based on equitable duties of confidence in relation to a victim of sexual assault in relation to an alleged breach of the statutory prohibition on publication of identification of the victims in proceedings in Section 578A of the Crimes Act. Fullerton J found that no such cause of action was available. Ultimately, however, the question of whether there is a breach of privacy cause of action in tort or as a species of breach of confidence will be determined by the High Court (the Australian ultimate court of appeal) or by statute. In addition to the various class actions brought or currently under consideration in respect of

14 www.presscouncil.org.au/privacy-principles/.

15 See, for example, the Australian Commercial Television Code of Practice, www.acma.gov.au/theACMA/About/The-ACMA-story/Regulating/broadcasting-codes-schemes-index-radio-content-regulation-i-acma.

16 See Australian Privacy Principle 3.3.

17 [2001] HCA 63.

18 [2018] NSWCA 1996.

data breaches (under varying causes of action),[19] the ACCC Report and subsequent issues paper both recommend that a statutory privacy tort be introduced. The government will respond to that proposal after further submissions have been received and considered. Similar proposals have been made by the Australian Law Reform Commission previously (most recently in 2014) and have not resulted in any change to the law.[20]

In a recent case, the Privacy Commissioner established that the extraterritorial operation of the Privacy Act extended to *Facebook Inc: Australian Information Commissioner v. Facebook Inc*.[21] In March 2020, the Australian Information Commissioner (the Commissioner) filed proceedings in the Federal Court against Facebook Inc, the US-based entity, and Facebook Ireland Limited, in relation to the disclosure of Australian Facebook users' personal information to the 'This is Your Digital Life' app, which was then sold to Cambridge Analytica Ltd. The Commissioner alleged serious and repeated interferences with privacy in contravention of Australian privacy law, including that:

a Facebook disclosed the users' personal information for a purpose other than that for which it was collected, in breach of Australian Privacy Principle (APP) 6;

b Facebook failed to take reasonable steps to protect the users' personal information from unauthorised disclosure in breach of APP 11.1(b); and

c these breaches amounted to serious or repeated interferences, or both, in the privacy of the users, in contravention of Section 13G of the Privacy Act.

The Federal Court granted leave for the Commissioner to serve various documents on Facebook Inc in the United States and Facebook Ireland in Ireland (in *Australian Information Commission v. Facebook Inc*[22]). Facebook Inc subsequently filed an interlocutory application to set this aside, arguing that there was no prima facie case against it because it did not carry on business in Australia and did not therefore attract the extraterritorial operation of the Privacy Act.[23]

The Court found that the Commissioner had established a prima facie case that Facebook Inc carried on business in Australia, which included providing services to Facebook Ireland. The Court determined that the following activities in particular did establish a sufficient prima facie case to warrant exposing Facebook Inc to litigation in Australia on the basis that Facebook Inc directly carried on business in Australia:

a the installation and operation of cookies on computers and electronic devices of Australian users for the purpose of targeting advertising to those users;

b the provision of the Graph application programming interface (a tool that allows apps to request personal information from users' Facebook accounts) to Australian app developers; and

c the collection and holding of information from Australia users.

19 *Evans v. Health Administration Corporation* [2019] NSWSC 1781; see also https://www.mauriceblackburn.com.au/class-actions/current-class-actions/optus-data-breach/.

20 See 'Serious Invasions of Privacy in the Digital Era: Final Report', Australian Law Reform Commission Report 123, June 2014.

21 (No. 2) [2020] FCA 1307.

22 [2020] FCA 531.

23 See Section 5B of the Privacy Act 1988 (Cth).

The Court did not accept two arguments based on agency. The first was based on the statements of rights and responsibilities, being the contracts between the relevant Facebook entity and users. The Court rejected the argument that an Australian user, by agreeing to these statements, entered in to a contractual relationship with Facebook Inc. The Court's view was that Australian users entered into a contract with Facebook Ireland only, not on behalf of Facebook Inc, in the course of carrying on its own business in Australia. Accordingly, the Commissioner's argument that Facebook Ireland contracted with Australian users as agent for Facebook Inc did not succeed. The second unsuccessful agency argument was that Facebook Inc carried on business in Australia on the basis that Facebook Ireland conducted Facebook Inc's business in Australia.

On 25 October 2021, the Attorney General released the Privacy Act Review Discussion Paper, which raised for consideration significant potential changes to Australian privacy laws, including in relation to the definition of the term 'personal information', which is the key determinant of the applicability of the Act in adtech and other contexts; review of the media exemption, the small business exemption and the employee exemption; and consideration of consent and notification requirements. Submissions on the matters raised for consideration are due by 10 January 2022. At the same time, an exposure draft of the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (the Online Privacy Bill) was released and comment on the draft Bill was sought by 6 December 2021. The Online Privacy Bill will, if passed, significantly increase penalties for interference with privacy, give the Office of the Australian Information Commissioner (OAIC) clear authority to share information with other law enforcement agencies, and provide for enforceable online provider codes. Online provider codes would be developed by industry or the OAIC and would apply to all online providers. Breach of a code would constitute interference with privacy under the Privacy Act. Furthermore, the category of 'online providers' is proposed to be defined to include social media platforms, data brokerage services and large online platforms.

iii Other data regulation

Media entities may also be affected by the Security Legislation Amendment (Critical Infrastructure) Bill 2020 (Cth) (the SOCI Bill), which seeks to amend the application of the Security of Critical Infrastructure Act 2018 (Cth) to entities in the communications sector that own or operate a 'critical infrastructure asset'. The SOCI Bill introduces the following:

a obligations for applicable entities to implement risk management programmes and to notify their regulator of data breaches or other vulnerabilities within strict time frames;

b other notification obligations, including where a data storage or processing service provided on a commercial basis relates to business-critical data;

c enhanced cybersecurity obligations for systems of national significance, including statutory incident-response planning obligations and the requirement to undertake specific cybersecurity testing; and

d empowerment of government to issue directions, make intervention requests (where the regulator steps into the shoes of an entity to take certain actions to respond to a cybersecurity incident) and obtain information (for example, about the entity's security posture).

The specifics as to which of these will apply to media organisations (and to which organisations) will be dealt with by industry consultation as part of a co-design process for the rules underlying the Security of Critical Infrastructure Act 2018 (Cth). Consultation for the broadcasting sector is expected to occur from mid-June to late August 2022.

Media organisations subject to a data breach involving ransomware and that pay the ransom could possibly be subject to the Ransomware Payments Bill 2021 (Cth), which imposes a mandatory obligation on an entity that makes a ransomware payment to notify the Australian Cyber Security Centre (ACSC) as soon as practicable. While not reflected in the Ransomware Payments Bill 2021, Tim Watts, MP, indicated in his second-reading speech that notification should occur before the entities make the payment. A civil penalty of 1000 penalty units (currently A$222,000) will apply for failure to notify.

If the Bill is passed, notices to the ACSC will be required to include the name and contact details of the entity, what the entity knows about the identity of the attacker and a description of the attack, including the cryptocurrency wallet to which the ransom was paid, the amount and any indicators of compromise (technical evidence of the attackers identity or methods). The notice will not be admissible in any criminal proceedings except for proceedings for giving false or misleading information.

iv Additional regulation of broadcasters

Broadcasters are also regulated under the Broadcasting Services Act 1992 (Cth) and are subject to licence conditions, codes and standards developed in accordance with the Act.

Key content rules for television broadcasters are contained in the Commercial Television Code of Practice. The Code contains rules relating to advertising time and placement on television, gambling advertising, programme classification and rules for news reporting requiring accuracy, fairness and respect for privacy. The Code is registered by the Australian Communications and Media Authority (ACMA). Content standards promulgated by the ACMA contain Australian content requirements. There are also children's television standards.

Radio broadcasters are also subject to a similar regulatory scheme, and the Commercial Radio Code of Practice, which is registered with the ACMA, contains key rules relating to content.

On 30 September 2020, the Australian Minister for Communications announced changes designed to assist broadcasters, which are more heavily regulated than digital platforms such as Netflix. Sub-quota content requirements for commercial broadcasters will be made more flexible and less prescriptive, and there will be a reduction in Australian content spend requirements for subscription broadcasters. Digital platforms will not be subject to Australian content obligations, but as from January 2021 are required to report on Australian activity and Australian content spend.

v Additional regulation of the internet

Schedule 7 of the Broadcasting Services Act 1992 enables the ACMA to issue notices to hosting services, live content services and links services in relation to prohibited content (generally content that is refused classification or in breach of classification requirements). Schedule 8 regulates online gambling services.

vi Key regulators

The ACMA is the key regulator for broadcasters, internet service providers and in relation to direct marketing by electronic means. It administers legislation, including the Broadcasting Services Act 1992 (Cth), the Spam Act 2003 (Cth) and the Telecommunications Act 1997 (Cth).

The Australian Privacy Commissioner has responsibility for administering the key private sector privacy legislation, the Privacy Act 1988 (Cth).

The ACCC has recently become active in the media law area, as discussed in Section I.

The Australian Press Council is a self-regulatory body that hears complaints in relation to publications by print and online publishers.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

Australia does not have any express constitutional freedom of speech.

However, the Australian High Court has repeatedly confirmed that an implied freedom of speech in relation to government and political matters arises from Australia's Constitution. When construing legislation, a presumption applies that the law was intended to be consistent with this implied constitutional freedom (which may affect the way in which it is interpreted). Laws that are not consistent with the implied constitutional freedom even after that presumption has been applied are invalid.

A majority of the High Court in *McCloy and Others v. New South Wales and Another* found that the test for the constitutional validity (the 'structured proportionality' test) of a law is as follows:

> *1. Does the law effectively burden the freedom in its terms, operation or effect?*
> *If 'no', then the law does not exceed the implied limitation and the enquiry as to validity ends.*
>
> *2. If 'yes' to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as 'compatibility testing'.*
> *The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.*
> *If the answer to question 2 is 'no', then the law exceeds the implied limitation and the enquiry as to validity ends.*
>
> *3. If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what is referred to in these reasons as 'proportionality testing' to determine whether the restriction which the provision imposes on the freedom is justified.*
>
> *The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:*
> *suitable – as having a rational connection to the purpose of the provision;*

> *necessary – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;*
> *adequate in its balance – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.*
>
> *If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be 'no' and the measure will exceed the implied limitation on legislative power.*[24]

The High Court considered these principles in 2019 in the context of laws restricting communication, and protest, in relation to the subject of abortion in safe access zones near abortion clinics.[25] Those laws were found to be constitutionally valid. The Court found that they were for a legitimate purpose (to protect the privacy and dignity of people attending the clinic) and were not disproportionate (they were neutral regarding pro-choice and anti-abortion viewpoints, and only applied in a restricted area). The law relating to communication generally was not found to burden political speech as it was not connected to any election process (which meant that it did not infringe the implied freedom). The law in relation to protests was found to burden political speech and was found to be valid on the basis above (it was for a legitimate purpose and was not disproportionate).

The principles were again considered in *Comcare v. Banerji*,[26] where the High Court was asked to decide whether provisions pursuant to which a public servant's employment was terminated imposed an unjustified burden on the implied freedom of political communication thereby rendering the dismissal unlawful. The dismissal was for code of conduct breaches arising out of a public servant's publication of anonymous posts on social media critical of the government. While the court found that the impugned provisions clearly burdened the implied freedom, that burden was justified. The outcome in this case confirms that the implied freedom of political communication is not an unfettered right.

More recently in 2021, the High Court considered whether laws imposing registration obligations with respect to communication activities undertaken in Australia on behalf of foreign principals were invalid on the grounds that the laws infringe the implied freedom.[27] The High Court, by majority, found the laws were not invalid. While the requirement of registration burdened the implied freedom, the burden was justified. The provisions were held to have a legitimate purpose, namely to achieve transparency as a means of preventing or minimising the risk that foreign principals will exert influence on the integrity of Australia's political or electoral processes. The provisions were proportionate to the achievement of that purpose. It is, however, worth noting the separate judgment of Steward J, who was appointed to Australia's High Court in December 2020. While His Honour agreed with the majority outcome on the validity of the laws in question, he made obiter remarks questioning the existence of the implied freedom, stating that it 'may not be sufficiently supported by

24 *McCloy and Others v. New South Wales and Another* (2015) 325 ALR 15 at 18–19 per French C J and Kiefel, Bell and Keane J J.

25 *Clubb v. Edwards*, *Preston v. Avery* (2019) 267 CLR 171; (2019) 366 ALR 1.

26 (2019) 267 CLR 373; (2019) 372 ALR 42.

27 *Libertyworks Inc v. Commonwealth of Australia* (2021) 391 ALR 188; [2021] HCA 18.

the text, structure and context of the Constitution'.[28] Whether future parties will take up this apparent invitation to submit that the implied freedom does not exist as a necessary implication remains to be seen.

There is also case law to support the proposition that principles of open justice are similarly the subject of implied constitutional protection. In *Russell v. Russell*,[29] a commonwealth law requiring state courts to hold family law proceedings in closed court was found by a majority of the High Court to be constitutionally invalid. Barwick C J observed that 'the courts of the States . . . are in general required, because of the nature of the courts themselves and of the functions they perform, to sit and exercise jurisdiction in a place open to the public'. The Court in that case found that the commonwealth did not have power to regulate state courts and that the circumstances in which state courts can be closed must be regulated by state legislatures.

Principles of open justice have been the subject of close attention in the past year for two reasons. First, the NSW Law Reform Commission is conducting a review of laws affecting open justice, and the Victorian Law Reform Commission is conducting a review of contempt laws.[30] Second, journalists and media organisations have been charged with contempt in relation to publications in connection with the trial of Archbishop George Pell.

ii Newsgathering

Key laws affecting newsgathering in Australia include the law of trespass, surveillance laws and criminal laws prohibiting the release to the media of certain information concerning government and security matters.

Under the law of trespass, journalists can go to the front door of a private property to request permission to film, but if refused permission cannot thereafter film on the property.

Australia has state, territory and commonwealth surveillance laws, which are different in substance. Consequently, it is important to understand which laws apply in the state or territory in which newsgathering activities are undertaken. There are surveillance laws affecting the recording of conversations, use of devices to hear or monitor conversations, video recording, use of tracking devices and computer surveillance. In relation to the recording of conversations, the commonwealth law applies in respect of any communications intercepted when passing over the public switched telephony network, and state and territory laws generally otherwise apply. The applicable law is generally that of the state in which a recording is made.

Carriers and carriage service providers have obligations to retain certain telecommunications under the Telecommunications (Interception and Access) Act 1997 (Cth). Those obligations have been criticised on the basis that they give certain intelligence agencies a means to identify journalists' sources. To do so, they must obtain a warrant from

28 ibid. at [249].

29 (1976) 9 ALR 103.

30 See www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Courtinformation/Project_update.aspx; and www.lawreform.vic.gov.au/all-projects/contempt.

a judicial officer or lawyer appointed by the relevant minister. Hearings take place in secret and without participation by the journalist, which has given rise to concern about the adequacy of the protection this process offers.[31]

iii Freedom of access to government information

Australia has a federal system, with commonwealth, state and territory governments. Freedom of information legislation is in place in relation to the commonwealth, and each state and territory.[32] The legislation enables journalists to seek access to documents held by government agencies. The documents must be produced unless an exception applies. Media organisations are concerned that agencies too often rely upon exceptions and have called for reforms to facilitate more extensive, and faster, media access to important government documents.[33]

Court rules also allow for journalists to seek access to documents about court proceedings. In general, access is allowed to material read or relied upon in open court unless a suppression order is in place, or there are exceptional circumstances. In general, access is not readily given to material in a court file that has not yet been read or relied on in open court.

iv Protection of sources

Article 3 of the Media, Entertainment and Arts Alliance Code of Ethics requires that journalists should aim to attribute information to its source and not agree to anonymity without first considering the source's motives and any alternative attributable source. It provides that 'where confidences are accepted, respect them in all circumstances'. Australian professional journalists generally abide by this rule, and some have gone to jail for not revealing sources when ordered to do so.

The newspaper rule (also known as the rule in *Cojuangco*) allows media organisations to avoid disclosing sources until the final hearing of a defamation action. If, however, a journalist gives evidence at the final hearing (which is important for defences such as statutory qualified privilege) and is asked to reveal a source then he or she is obliged to do so, and refusal to do so constitutes contempt.

Under Section 126K of the Evidence Act (Cth), journalists are protected from compulsion to disclose confidential sources, but this is subject to a power of the court to order disclosure if it is satisfied that the public interest in requiring an answer outweighs countervailing public and private interests. Each state and territory, except for the Northern Territory, has similar provisions in place.

v Private action against publication

The main basis upon which injunctive relief restraining publication is obtained in Australia is breach of confidence. This cause of action is available where a journalist is subject to a duty of confidence or (more commonly) is on notice of a breach of confidence by his or her source. Equity generally imposes a duty of confidence on a person who is on notice that information has been imparted to him, her or it in breach of confidence.

31 See, for example, 'Impact of the Exercise of Law Enforcement and Intelligence Powers on the freedom of the press: submission to the Parliamentary Joint Committee on intelligence and security', Professor Peter Fray, Professor Derek Wilding and Richard Coleman, 31 July 2019.

32 See, for example, the Freedom of Information Act 1992 (Cth).

33 www.theguardian.com/australia-news/2019/jan/02/how-a-flawed-freedom-of-information-regime-keeps-australians-in-the-dark.

Australian courts do not generally grant injunctive relief on the basis of defamation. The reason for this is that the courts recognise that there is a public interest in freedom of speech.

vi Government action against publication

In *Smethurst v. Commissioner of Police*,[34] the High Court quashed the warrant pursuant to which Australian Federal Police (AFP) searched the home of Ms Smethurst and seized data from her phone. However, the AFP was not required to return the data to Ms Smethurst.

On 4 June 2019, the AFP searched Ms Smethurst's home relying on a warrant issued the previous day. The AFP took Ms Smethhurst's mobile phone, demanded and obtained her passcode, copied data from the phone and searched the data for documents before copying them to a USB drive.

Nationwide News Pty Ltd and Ms Smethurst argued that the warrant was invalid, and that the seized data should be delivered up to her and destroyed.

The High Court held that the warrant was invalid because it did not satisfy the statutory condition that it state the offence to which it relates. It also substantially misstated an offence said to arise under Section 79(3) of the Crimes Act. Having reached that conclusion, the Court said it was not necessary to answer further questions, including whether there was an infringement of the implied freedom of political communication.

This finding was unanimous, but opinions differed as to the consequences of this finding. The majority determined that the AFP was not required to deliver up the data to Ms Smethurst. However, Gordon J and Edelman J (in the minority) did find that it should be delivered up to Ms Smethurst, allowing her to delete it, and requiring the AFP to delete any other copies. At a practical level, that does mean that the data could be used at some point in the future in an action.

Although Ms Smethurst did not claim a right to privacy and did not ask the Court to continue the debate left open in *ABC v. Lenah Game Meats Pty Ltd*, the High Court did discuss it in the context of whether there was a basis for injunctive relief. Ms Smethurst pointed to previous cases in which a party had sought an injunction requiring the destruction or delivery up of information, including *Lenah Game Meats*. However, the majority said that there was no authority to the effect that a remedy could be granted in the absence of an identified legal right, and Ms Smethurst could point to no such right.

In this context, the majority described *Lenah Game Meats* as having a parallel to Ms Smethurst's case in that the claim for an injunction was not based upon a claim to property or, more broadly, a recognised cause of action. That was not to say, however, that one might not be available with respect to an invasion of privacy. Accordingly, a majority of the Court left open the question of whether Ms Smethhurst may have a right of action against the commonwealth on the basis of a tort of privacy. The High Court did not determine whether such a tort exists. It noted that the question was left open in *Lenah Game Meats* and that the Full Federal Court required delivery up of storage devices in another case involving an invalid seizure of material by the AFP. The majority said that the plaintiff might seek a remedy of this kind by way of separate proceedings.[35]

34 [2020] HCA 14.

35 Per Kiefel, Bell and Keen JJ at paragraphs 89 to 90.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

The Copyright Act 1968 (Cth) (the Copyright Act) is the predominant source of Australia's copyright law and gives protection to:

a works, being literary, dramatic, musical and artistic works; and

b subject matter other than works (sound recordings, cinematograph films, radio broadcasts, television broadcasts and published editions).

The Copyright Act gives rights holders the exclusive right to carry out certain acts in respect of copyright-protected material in Australia, including the communication of a work to the public, and provides for various mechanisms for enforcement if those rights are exercised by others without authorisation. Protections have recently been extended to allow rights holders to obtain website-blocking injunctions.

For copyright to subsist in a work or subject matter other than works under the Copyright Act:

a the work must be original[36] (there is no requirement of originality for the subsistence of copyright in subject matter other than works);

b it must have the necessary connecting factor between the relevant material and the author or Australia. The required connecting factor depends not only on the type of material, but also on whether or not the work has been published. For example, for a published sound recording, copyright subsists if the maker was an Australian citizen or person resident in Australia or a body corporate incorporated under a law of the commonwealth or a state of Australia,[37] the recording was made in Australia[38] or the first publication of the recording took place in Australia;[39] and

c most types of works or subject matter other than works must be reduced to a material form. For example, in the case of a literary work, it must be reduced to writing or some other material form.[40] However, a sound or television broadcast is protected once it is made from a place in Australia.[41]

Australian copyright law largely reflects the basic framework provided by the Berne Convention: national treatment and automatic protection are reflected in the Copyright Act. However, there are some variations. For example, the terms of protection in Australia are longer than the minimums provided for under the Berne Convention. Generally, the Copyright Act provides protection for the life of the author and for 70 years after the end of the year of the author's death. In respect of duration of protection, see item (c) below.[42]

Recent changes to Australian copyright law include:

a measures to prevent online piracy: on 11 December 2018, the website-blocking provisions in Section 115A of the Copyright Act were amended and expanded to make it easier for rights holders to obtain injunctions requiring internet service

36 Copyright Act, Section 32.

37 id., Section 89(1).

38 id., Section 89(2).

39 id., Section 89(3).

40 id., Section 22.

41 id., Section 91.

42 See the Resale Royalty Right for Visual Artists Act 2009 (Cth).

providers to block access to online locations facilitating copyright infringement. The provisions now also allow for injunctions that require search engine providers to prevent the dissemination of search results that link to online locations facilitating copyright infringement;

b extension of safe harbours: on 29 December 2018, further limitations were introduced on liability under the Copyright Act of service providers in the disability, education and cultural sectors in relation to their activities online; and

c changes to copyright duration: on 1 January 2019, new time limitations for copyright protection came into force and protection for unpublished materials became subject to a time limitation (previously unlimited). In certain circumstances, durations are, in effect, now shortened.

Recent notable infringement or enforcement disputes include:

a *Roadshow Films Pty Limited v. Telstra Corporation Limited*:[43] successful application pursuant to Section 115A of the Copyright Act by film studios resulting in the blocking of various domain names and IP addresses accessible via apps installed on TV smart boxes;

b *Australasian Performing Right Association Ltd v. Telstra Corporation Limited*:[44] successful application pursuant to Section 115A of the Copyright Act by music rights holders resulting in the blocking of various domain names of websites providing facilities for material to be ripped from YouTube sites;

c *Hells Angels Motorcycle Corporation (Australia) Pty Ltd v. Redbubble Ltd & Anor*:[45] claim by Hells Angels Motorcycle Corporation (Australia) Pty Ltd, which included a copyright infringement claim, against Redbubble, operator of a website allowing users to upload images on various goods, before arranging the production and distribution of the goods. The copyright claim failed because of lack of proof of ownership, but it was found that Redbubble would have infringed copyright, in operating the relevant website, if ownership had been established; and

d *Boomerang Investments Pty Ltd v. Padgett (Liability)*:[46] enforcement action regarding two songs that featured aspects of the pop song 'Love is in the Air' recorded by John Paul Young. Similarities between the allegedly infringing works and 'Love is in the Air' were sufficient to amount to infringement. The case involved consideration of whether the respondents had made the works available, for the purposes of the infringement claim, for streaming via digital music platforms.

The most significant recent reform proposal has been Recommendation 8 of the ACCC Report, following its recent inquiry into digital platforms. Recommendation 8 proposes that digital platforms (online search engines, social media and digital content aggregators) be subject to a mandatory industry code providing for certain standards around copyright takedown requests. It is proposed that under the code, among other matters, digital platforms would be subject to certain time frames to act on copyright takedown requests. An intended

43 [2018] FCA 582.

44 [2019] FCA 751.

45 [2019] FCA 355.

46 [2020] FCA 535.

consequence of this recommendation is the increased likelihood that digital platforms could, in certain circumstances, be found to be authorisers of copyright infringement under the Copyright Act.

In September 2021, various legislative changes to Australia's designs system were introduced by way of the Designs Amendment (Advisory Council on Intellectual Property Response) Act 2021 (Cth). These changes include:

a a 12-month grace period for designs that are inadvertently disclosed (for example, on social media) prior to filing for registration in respect of that design, such that they will still be able to file for protection during the grace period;

b a corresponding exemption from infringement for third parties that copy a design from a disclosure by the design owner before the priority date; and

c provision for the exclusive licensee of a design to commence infringement proceedings.

ii Personality rights

Australia does not have personality rights in the same sense as the United States does.

Some relevant protection is, however, provided under the Australian Consumer Law (ACL), Schedule to the Competition and Consumer Act 2010 (Cth) (CCA) and the tort of passing off, and it is common for plaintiffs to rely upon both of these causes of action. For example, in *Hogan v. Pacific Dunlop Ltd*,[47] Paul Hogan, the actor who portrayed Crocodile Dundee, successfully sued Pacific Dunlop Ltd, which used a proximate portrayal of the Crocodile Dundee character in its advertising, which was found to be a misleading representation that Mr Dundee endorsed Dunlop.

The ACL prohibits a number of unfair business practices. Section 18 of the CCA prohibits conduct in trade or commerce that is misleading or deceptive or likely to mislead or deceive. The CCA provides for private rights of suit against individuals and corporations that engage in this conduct, which can be used to protect personality rights.

In addition, Section 29(1) specifically prohibits individuals and corporations, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with their promotion, from:

a making false or misleading representations that a particular person has agreed to acquire goods or services;

b making false or misleading representations that purport to be testimonials by any person relating to goods or services;

c making false or misleading representations relating to goods or services concerning:
- a testimonial by any person; or
- a representation that purports to be such a testimonial;

d making false or misleading representations that goods or services have sponsorship, approval, performance characteristics accessories, uses or benefits; or

e making false or misleading representations that the person making the representation has a sponsorship, approval or affiliation.

Reputation is also frequently protected by way of defamation (see Section III.v).

47 (1988) 83 ALR 403.

iii Unfair business practices

A variety of different laws may be brought to bear in relation to editorial malpractice. These include copyright (in the case of misappropriation), restrictions on publication, such as *sub judice* contempt of court, and the laws of defamation. There are also standards and codes of practice enforced by bodies such as the Australian Press Council (with respect to newspapers, magazines and associated digital titles) and the Australian Communications and Media Authority (with respect to broadcasting and telecommunications). For example, in 2018, the Australian Communications and Media Authority found that a segment that aired on a network television morning programme, Sunrise, provoked serious contempt on the basis of race in breach of the Commercial Television Industry Code of Practice. Litigation was commenced by the network over the decision but later ceased.

V COMPETITION AND CONSUMER RIGHTS

i Enforcement proceedings

In 2019, Australian courts handed down two key judgments in the media and entertainment space. The first case is an action brought by the ACCC against ticket reseller Viagogo AG. In this case, the Federal Court found that Viagogo contravened the ACL and misled consumers. Viagogo's impugned conduct included claiming that tickets to certain events were scarce when this only related to the number of tickets available on Viagogo's platform, creating a false sense of urgency. The Federal Court also found that Viagogo's use of the word 'official' on its website and online marketing was misleading, as consumers were led to think that they were purchasing tickets from an official retailer, when in fact, Viagogo is only a reselling platform. It was also held that Viagogo failed to sufficiently disclose additional fees or specify a single price for tickets.

The second case was an action brought by the ACCC against Valve Corporation, one of the largest online gaming retailers and operators of the Steam distribution platform. In this case, the Federal Court held that Valve breached the ACL by representing that consumers were not entitled to receive a refund for any games. This representation was held to mislead customers as to the nature of consumer guarantees. Valve was ordered to pay a penalty of A$3 million.

ii Mergers and acquisitions

In October 2017, the ACCC updated its Media Merger Guidelines[48] in response to changes to Australia's media control and ownership laws under the Broadcasting Service Act 1992. Since these reforms, the ACCC has approved several key mergers and acquisitions in the media and entertainment industry in Australia, including the merger of Nine Entertainment and Fairfax Media (which created Australia's largest media company). In the past 24 months, it has also approved JCDecaux SA's acquisition of APN Outdoor Group Limited, oOh!media

48 The ACCC's Media Merger Guidelines provide guidance on the ACCC's approach when assessing whether to approve media mergers, and outline potential areas of focus for the ACCC when assessing mergers in the media sector.

Limited's acquisition of Adshel Street Furniture Pty Ltd, and Seven Network and Nine Network's acquisition of Network Ten's shares in TX Australia, a company providing transmission services.

VI DIGITAL CONTENT

i Overview

Australia does not have an equivalent of the United States' Section 230 of the Communications Decency Act. However, the state and territory attorneys general are considering whether protection of this kind should be made available in Australia as part of the second tranche of defamation law reform, which will focus on liability for online publications and will occur over the course of 2020 and 2021.

Clause 91 of Schedule 5 of the Broadcasting Services Act 1992 (Cth) provides immunity from state and territory laws and common law and equitable principles to internet service providers and internet content hosts where they are not aware of the nature of the content in question. Clause 91 has not been considered by the courts and the extent of the protection that it gives these entities is uncertain. In particular, based on the decisions relating to publication principles discussed directly below, the threshold for relevantly having knowledge of the nature of content may be low. This immunity will soon be replaced by Section 235 of the Online Safety Act 2021 (Cth), which will commence on 23 January 2022. This new immunity will apply to internet service providers and Australian hosting service providers. The definition 'Australian hosting service providers' will apply to a broad number of entities, including those who host material that has been provided on social media services, although the precise application of the new statutory immunity is currently unclear. However, explanatory memoranda indicate that a search engine, which merely indexes content and makes it searchable, would not meet the definition of a hosting service.

Online publications can give rise to civil liability under various doctrines, including defamation and (in cases where confidentiality has been breached) breach of confidence.

There are also various statutory crimes that affect publication online and elsewhere. A new crime relating to streamed content was introduced in 2019 in response to the streaming of shootings in New Zealand, with the passage of the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (Act). The Act contains offences that apply to internet service providers, content services and hosting services in relation to failure to remove or report abhorrent violent material.

Material will only be abhorrent violent material if it meets four criteria. First, the material must be in the nature of streamed or recorded audio, visual or audiovisual material.

Second, it must record or stream abhorrent violent conduct, which is defined to include terrorist acts, murder, attempts to murder, torture, rape and kidnap.

Third, it must be material that reasonable persons would regard in all circumstances as being offensive.

Fourth, it must be produced by a person (or two or more persons) who engaged in, conspired to engage in, attempted to engage in, or aided, abetted counselled or procured, or who was knowingly concerned in, the abhorrent violent conduct. It does not, therefore, apply in respect of material prepared by journalists (although it may apply in respect of any streaming by a journalist of footage originally produced by a perpetrator of the relevant conduct).

As yet the Act has not been the subject of judicial consideration.

ii Failure to report

Section 474.33 of the Act makes it an offence for an internet service provider, content service or hosting service (together, the regulated providers) to fail to refer material to the AFP where the relevant person:

a is aware that the service provided by the person can be used to access particular material that the person has reasonable grounds to believe is abhorrent violent material that records or streams abhorrent violent conduct that has occurred, or is occurring, in Australia; and

b does not refer details of the material to the AFP within a reasonable time of becoming aware of the existence of the material.

This is not the only offence relating to failure to report a crime. For example, under Section 316(1) of the Crimes Act 1900 (NSW), it is a crime punishable by up to two years in prison to fail to report a serious indictable offence.

Section 474.34 of the Act makes it an offence for a person to fail to ensure the expeditious removal of abhorrent violent material from a content service provided by that person. The fault element in relation to this material being accessible through the service, and in relation to failure to expeditiously remove it, is recklessness.

Defences to this offence are expressly provided for in Section 474.37(1) of the Act, which provides that the offence contained in Section 474.34(1) of the Act does not apply where:

a the material relates to a news report, or a current affairs report, that is in the public interest and is by a person working in a professional capacity as a journalist;

b the accessibility of the material relates to the development, performance, exhibition or distribution, in good faith, of an artistic work;

c the accessibility of the material is for the purpose of advocating the lawful procurement of a change to any matter established by law, policy or practice in an Australian or foreign jurisdiction, and the accessibility of the material is reasonable in the circumstances for that purpose;

d the accessibility of the material is necessary for law enforcement purposes, or for monitoring compliance with, or investigating a contravention of, a law;

e the accessibility of the material is for a court proceeding;

f the accessibility of the material is necessary and reasonable for scientific, medical, academic or historical research; or

g the accessibility of the material is in connection with and reasonable for the purpose of an individual assisting a public official in relation to the public official's duties or functions.

The Act added to relevant offences already in the Commonwealth Criminal Code. For example, Section 474.17 makes it an offence to use a carriage service in a way that reasonable persons would consider to be menacing, harassing or offensive. Section 474.22 makes it an offence to access, publish or transmit child abuse material, and Section 474.25 makes it an offence for an internet content provider or internet content host to fail to report child pornography material to the AFP within a reasonable time of becoming aware of it.

There are also state and territory statutory restrictions on publication and various offences that can be committed through internet publication.

iii Online Safety Act

The Australian Online Safety Commissioner has powers and functions under various legislation designed to protect the public against unlawful or otherwise harmful content on the internet. This includes Schedules 5 and 7 of the Broadcasting Services Act 1992 (Cth), Section 581 (2A) of the Telecommunications Act 1997, Section 5 of the Enhancing Online Safety (Protecting Australians from Terrorist or Violent Criminal Material) Legislative Rule 2019 and Sections 474.35 and 474.36 of the Criminal Code Act 1995 (Cth).

The Online Safety Act, which will commence on 23 January 2022, will give the eSafety Commissioner further powers to address online bullying and abuse, extending and introducing powers regarding material relating to children and adults respectively. It will also contains provisions to address the posting of intimate images without consent.

The complaints system for cyberbullying material targeted at an Australian child includes the following components:

a a removal notices may be given to a social media service, a relevant electronic service, a designated internet service or a hosting service requiring the removal from the service of cyberbullying material targeted at an Australian child or adult; and

b a person who posts cyberbullying material targeted at an Australian child or adult may be given a notice (an end user notice) requiring the person to remove the material, refrain from posting cyberbullying material or apologise for posting the material.

The complaints and objections system for non consensual sharing of intimate images includes the following components:

a a person who posts, or threatens to post, an intimate image may be liable to a civil penalty;

b the provider of a social media service, relevant electronic service or designated internet service may be given a notice (a removal notice) requiring the provider to remove an intimate image from the service;

c an end user of a social media service, relevant electronic service or designated internet service that posts an intimate image on the service may be given a notice (a removal notice) requiring the end user to remove the image from the service; and

d a hosting service provider that hosts an intimate image may be given a notice (a removal notice) requiring the provider to cease hosting the image.

The online content scheme includes similar notice provisions in relation to other specified types of material. The Online Safety Act also contains provisions enabling internet service providers to be requested or required to block material that promotes, incites, instructs in or depicts abhorrent violent conduct. The Act further provides for the development of industry codes and standards, and for the commissioner to make determinations in relation to online service providers and basic online safety expectations for social media services, relevant electronic services and designated internet services.

VII CONTRACTUAL DISPUTES

Licensing disputes occasionally arise within the media and entertainment sector in Australia. They are heard at first instance before the Copyright Tribunal of Australia (the Tribunal), which has jurisdiction with respect to statutory licences (or statutory exclusions from infringement) and licences negotiated between the copyright owner, or its representative, and the licensee. A decision of the Tribunal can be appealed to the Federal Court.

The limits of the Tribunal's powers were recently tested in *Phonographic Performance Company of Australia Ltd v. Copyright Tribunal of Australia*.[49] The Phonographic Performance Company of Australia (PPCA) is an organisation representing copyright owners of sound recordings. In 2017, the Tribunal made a determination that the licensing scheme between PPCA and Foxtel should be varied to permit Foxtel to use the sound recordings on its streaming platform, Foxtel Now. On appeal, the Federal Court found that neither the PPCA nor its members were willing to grant Foxtel the right to stream their work on Foxtel Now. The Tribunal had overstepped its powers by proposing a scheme involving rights that the licensor was not willing to license.

VIII YEAR IN REVIEW

As can be seen above, 2021 has been a year in which changes that have been under consideration for the past two years have started to come to fruition. In particular, the News Media and Digital Platforms Mandatory Bargaining Code legislation and the amendments to defamation laws were enacted and commenced.

IX OUTLOOK

In the coming year, the outcomes of the remaining review processes should become clear. The amendments to defamation law will be passed by each Australian state and territory and they will commence. The likely future of Australian privacy law and regulation of interactions between digital platforms and the media will also become clearer.

49 [2019] 368 ALR 203.

Appendix 1

ABOUT THE AUTHORS

SOPHIE DAWSON

Bird & Bird

Sophie Dawson is a technology, media and telecommunications partner at Bird & Bird in the firm's Sydney office, and head of the disputes practice in Australia. Sophie is a media lawyer with extensive experience in advising on, and resolving disputes in relation to, media content issues. She has advised clients on major law reforms, including the Australian Competition and Consumer Commission's Digital Platform Review. She regularly provides prepublication advice, and acts for media defendants in defamation, copyright and other media-related proceedings. Sophie has specialist privacy expertise, including in relation to the media sector. Her experience has included instructing in the High Court in the *Dow Jones v. Gutnick* matter for 18 of the world's major media and internet organisations that intervened in that proceeding, which determined key choice of law and publication issues in relation to internet defamation. She also acted for a major broadcaster in successfully defending an interlocutory injunction application by a rival broadcaster in relation to a television reality cookery programme copyright dispute. Sophie sits on a variety of committees and advisory boards, and is co-author of the looseleaf service Media and Internet Law and Practice.

JULIE CHEESEMAN

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Julie Cheeseman is a partner at Bird & Bird in the firm's Sydney office, where she specialises in media and technology disputes and advice.

Julie has over 15 years' experience in managing IT&T and media disputes across a range of jurisdictions and forums. She enjoys working closely with my clients to devise and implement strategic and effective approaches to case formulation, presentation and resolution.

Her technology dispute experience covers a variety of technologies and complex implementations, including billing systems, inventory management systems, customer management systems, e-Health systems and satellite and cable transmission networks. Julie analyses complex IT supply contracts and gives detailed written advice on liability and remedies arising under contract and the common law.

She has also managed many disputes for media organisations such as defamation, copyright, contempt and suppression order matters. She regularly provides prepublication advice to editors, journalists and producers in relation to print, digital and film publications.

In addition to her disputes practice, Julie advises public and private sector clients with respect to Australia's privacy and data breach legislation. She also has a keen interest in assisting clients with internal and regulatory investigations.

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Joel Parsons is a media, entertainment and technology senior associate at Bird & Bird in the Sydney dispute resolution group. Joel's practice focuses on contentious media work and contentious or non-contentious IT, IP and advertising matters. He has experience across various jurisdictions involving pre-action negotiation, briefing counsel, discovery and interlocutory procedures, preparation of pleadings and evidence, settlement negotiations and formal conclusion of proceedings.

EMMA CROFT

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Emma Croft is an associate at Bird & Bird in the Sydney dispute resolution group, specialising in media and technology disputes, commercial litigation and privacy advice, working for Sophie Dawson and Troy Gurnett.

Emma has a strong background in regulatory matters, particularly in the financial services and media sectors, having previously worked at another international law firm in their technology, media and telecommunications, and dispute resolution and regulatory investigations teams.

She has considerable experience advising on privacy and surveillance matters and have assisted with discovery, drafting court documents and preparing evidence in various disputes and regulatory investigations ranging in size, including assisting to resolve an insurance dispute in respect of a data breach, an OAIC investigation into serious interferences with privacy and various other ASIC and AUSTRAC investigations. Emma also has experience in the consumer and commercial division of the NSW Civil and Administrative Tribunal, having drafted submissions and advice and prepared all evidence in a housing dispute.

In the technology and communications and financial sectors, Emma has advised on regulatory obligations in respect of data, privacy and cybersecurity, and assisted with the negotiation and drafting of various Software as a Service agreements and uplift agreements designed to ensure regulatory compliance, for example with APRA Prudential Standard CPS 234 (Information Security).

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